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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1951

No. 134

A/S J. LUDWIG MOWINCKELS REDERI *et al.*
Appellants

v.

ISBRANDTSEN CO., INC.
Appellee

FEDERAL MARITIME BOARD AND UNITED STATES DEPARTMENT OF AGRICULTURE
Intervenors

BRIEF OF A/S J. LUDWIG MOWINCKELS REDERI, ET AL., FILED UNDER RULE 7(3) IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Dated: June 21, 1951.

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Supreme Court of the United States

OCTOBER TERM 1951

A/S J. LUDWIG MOWINCKELS REDERI, BLACK DIAMOND STEAMSHIP CORPORATION, COMPAGNIE GENERALE TRANSATLANTIQUE, COMPAGNIE MARITIME BELGE, CUNARD WHITE STAR, LTD., DAMPSKIBSSELSKABET AF 1912 A/S, A/S DAMPSKIBSSELSKABET SVENDBORG, N.V. NEDERLANDSCH-AMERIKAANSCHE STOOMVAART-MAATSCHAPPIJ, UNITED STATES LINES COMPANY, WATERMAN STEAMSHIP CORPORATION, ELLERMAN'S WILSON LINE, LTD., and SOUTH ATLANTIC STEAMSHIP LINE INC., as members of NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, and/or CONTINENTAL NORTH ATLANTIC WESTBOUND FREIGHT CONFERENCE,

Appellants,

v.

ISBRANDTSEN CO., INC.,

Appellee,

FEDERAL MARITIME BOARD and UNITED STATES DEPARTMENT OF AGRICULTURE,

Intervenors.

Brief of A/S J. Ludwig Mowinckels Rederi, et al., Filed under Rule 7(3) in Opposition to Appellee's Motion to Dismiss or Affirm

Appellee's motion fails to evaluate the true situation presented by the appeal papers, and is otherwise ill-conceived. Its counsel recognizes that the Statutory Court declined to decide the only question tendered by the complaint—whether the Maritime Commission (now Federal Maritime Board) had power under Sec. 15 of the Shipping Act 1916 to approve the Conference agreements authorizing use of the contract rate system. Nevertheless appellee is content to avail of the confusion caused by the Court's

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holding (on a volunteered substituted issue) that the rate differential was "arbitrary" and therefore unjustly discriminatory.

This is not a rate case, and appellee is not a shipper. Appellee is only a competing carrier, choosing not to exercise its right to Conference membership, and indulging now in a collateral attack on a determination made December 1, 1950 by the Federal Maritime Board under general provisions of the Shipping Act. Said decision does not focus on a mere difference in rates—but directs itself to the broad provisions of that Act as they concern propriety of the so-called contract rate system, which its decision upheld.

Converting the case into a rate matter instead of disposing of the broad issues tendered by the complaint assuredly cannot be satisfactory or beneficial to appellee in the long run any more than to appellants. We also doubt that the decision of the Statutory Court can be satisfactory to the Department of Justice inasmuch as it is scarcely supportable on any ground mentioned therein. If the level of the rates (i.e., spread between contract and non-contract rates) had been an issue, the matter would not have been for determination by a Statutory Court, but rather by the administrative body in the first instance, at least.

Counsel for the Maritime Board moved the Court to remand the case to the Board so that the matter might be dealt with further there if any further action were deemed necessary. Appellants did not object to this procedure, but while doubting its necessity nevertheless concurred in the same if deemed necessary. The Statutory Court refused the Board's request.

The Department of Justice is further interested in the subject-matter in a suit brought by it in the District Court for New Jersey against members of the Far East Conference. In that litigation a petition for certiorari has been

filed in this Court by those defendants under the title *Far East Conference, et al.* v. *United States and Federal Maritime Board,* Docket , October Term 1951.

We believe that this matter, so important to the shipping interests of this country and other countries in international commerce, ought now to be reviewed by this Court in the interest of all concerned.

Without denying the broad and important economic and commercial effects of the Statutory Court's decision, appellee is for the moment content, and urges that it was merely "a conventional application of the principles governing judicial review of administrative action", leading to a suggestion that the questions now presented are insubstantial—this after a hard-fought litigation before the Court and the Commission (Board) extending from the end of October 1948.

The requirements of substantial justice in administrative law cannot be so lightly put aside nor be satisfied by mere formalism or dictionary definition. The spread between the contract and non-contract rate was known to be "arbitrary" i.e. a discretionary difference, before the Court referred the case to the Commission. The Court's distortion of one of the Board's findings of fact (which, it correctly found, related to the *method* by which the rates were determined) into a wholly unwarranted conclusion of legal effect does not fit into appellee's description. To the contrary, such approach would permit reviewing courts to substitute their own views and draw their own conclusions on matters requiring expert and technical treatment by agencies charged with the responsibility of carrying out broad objectives of Congress—particularly broad as concerns our foreign maritime trade.

Appellee's motion indicates that the finding in question ("arbitrary") related to the method by which the rates were "constructed" or arrived at, rather than to their effect. But the Shipping Act, 1916, concerns itself with

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effects and consequences. The question before the Maritime Commission, the Federal Maritime Board, and the District Court was whether the proposed contract-rate system—whatever the differential might be and however arrived at—was violative of the standards set forth in the Act, that is, whether it was unjustly discriminatory, retaliatory or detrimental to the commerce of the United States. In evaluating the numerous factors which lie behind these broad criteria, both the Trial Examiner and the Board found in favor of the defendant carriers' position and against the contentions of appellee.

Viewed as relating to *method* rather than as a conclusion of legal or economic effect, the Examiner's finding is in no way inconsistent with his conclusions or those of the Board. From the outset both the Examiner and the Board were aware that the differential was "arbitrarily" fixed in the sense that it represented a fixed percentage of the base rate. Yet this fact alone could not have justified a conclusion of unlawfulness. That same percentage had been used for many years. The responsibility entrusted to the Board by Congress carries with it the duty of evaluating the economic consequences of such a rate differential upon our merchant marine and foreign commerce. This the District Court recognized when it originally remanded the appellee to the Maritime Commission and the Commission, in turn, acknowledged its responsibility by conducting a thorough investigation into all aspects of the subject. Indeed, had the agency failed to take the broad statutory criteria into account in reaching its ultimate conclusions, its order would have failed to conform to well settled law. *North Carolina* v. *United States*, 325 U. S. 507, 512, 514-15.

Both the Examiner and the Board understood (apparently the Court did not) that all ocean freight rates are in fact and of necessity "arbitrary" in that they cannot be computed on the basis of detailed and specified cost factors distributed as to individual commodities, but are rather fixed at such practical levels as will permit cargoes to

move and vessels to operate. Ocean rates are almost as fluid as the sea itself. The Examiner and the Board also understood that under the system of absolute and unlimited competition advocated by appellee the rate-making process would become even more "arbitrary". The long and hard history of the steamship industry plainly demonstrates that in rate wars operating costs lose their significance.*

As already shown in appellant carriers' jurisdictional statement, the rate differentials were fixed upon the basis of previous experience; they had been approved by the Board and were entitled to a presumption of validity.

The Court failed, and seemed disinclined, to distinguish between regulatory provisions governing ocean carriers in the foreign trade and land regulations governing railroad fares and charges, public utility rates, etc. In the latter instances the effort is to relate the level of the rate to matters of investment, valuation, reasonable return, etc., etc. Such rules or standards cannot be applied to foreign water-borne commerce for obvious reasons. International competition and potential regulation and controls by countries of origin, destination and varying ownership must always be taken into account. This all greatly restricts and limits the permissible impact of regulation upon the ocean rate system. Ocean carriers of varying nations cooperate as best they can according to the varying laws which may control them. It is only when rates or practices of the carriers appear to violate specific statutory proscriptions (the Shipping Act, 1916, catalogues them fully) that questions arise for administrative determination. Consequently the area for ocean carrier determination of rates and rate practices is much broader than in land operations.

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*Mr. Isbrandtsen testified that Macy's make their prices by putting a price tag on, which was what he did. His rates, as pointed out by Mr. Andrews in language referred to by the Court and as found by the Examiner, were fixed at a given percentage less than those of competitors over whom his company had no control.

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This very fact makes potential competition between ocean carriers much keener and far more destructive in result, while the advantages of inter-carrier self-regulation become correspondingly more certain and apparent. This is just as true now as in 1914. See *Merchant Marine Study and Investigation,* Report 2494, 81st Congress, Second Sess., pp. 84-86 (1950), which brings up to date the findings and doctrines of the *Alexander Committee Report,* H. R. Doc. 805, 63rd Congress, Second Sess. (1914).

If the "finding of fact" relied upon by the Court should be considered as relating to effect rather than to method, the finding by such token would cease to be one of fact. It would become a conclusion, due to be arrived at legitimately only upon consideration by the experts of all the factors, including those within the special knowledge of the Board, as well as those specifically covered by or implied from the record, within the entire scope of the Shipping Act. See *Atlantic & Gulf/West Coast, etc.* v. *United States,* 94 F. Supp. 138, 141; *In re Electric Bond & Share Co.,* 95 F. Supp. 492. Whether the effect of circumstances, present or predictable, is good or bad involves a matter of opinion and conclusion and not a fact. Likewise, whether the contract rate system here involved was unjustly discriminatory, retaliatory or detrimental to the commerce of the United States is a matter of conclusion and not of fact. Had the Court's interpretation been correct, there would have been posed not merely an inconsistency between the Examiner's finding and the Board's conclusion, but also an inconsistency between the Examiner's own findings and his own conclusions.

The major error in this case lies not in any inconsistency between the Trial Examiner's finding of fact and his ultimate conclusions, or those of the Board, but in the real inconsistency between such finding, as recognized by the Court, and the *Court's* own conclusion therefrom. This involves more than a mere matter of definition; the Court's reasoning presents a complete *non-sequitur.* The Court

characterized as a "pivotal" or "basic" fact the Board's finding that the spread between the rates was arbitrarily determined. It then wrongly concluded that the *Board* had found the rate differential arbitrary *in effect* and that the Board was compelled to conclude that the contract rate system was unjustly discriminatory and illegal under Section 15 of the Shipping Act.

Such a holding was unwarranted, either by logic or by the record viewed as a whole. The Court overlooked, or refused to recognize, the real considerations upon which the Board's ultimate conclusions were premised, although these were set out at length in the report. Those considerations involved a careful weighing of the interests of shippers, carriers and the public in respect of rates, competition, commercial requirements and economic stability. They were of the character which this Court has always held vital in cases of this type. Thus in *U. S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U. S. 474, this Court assumed as true plaintiff's allegation that "the disproportionately wide spread [as high as 100%] of these differentials is wholly arbitrary and unreasonable". Nevertheless, it refused to accept the superficial arbitrariness of the differentials as conclusive of their illegality, saying (p. 485):

> "Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal."

So also in *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, where this Court upheld the administrative determination on the question of the legality of contract rates, it again

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emphasized the importance of these broad considerations (p. 304):

> "In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weight the disadvantages of the former against the advantages of the latter."

If the opinion of the Statutory Court is left uncorrected, that could only be regarded as a reversal of the policy dictated by those two cases, the only ones in the highest court dir ctly involving contract rates.

The findings necessary to support any particular order naturally vary with the statutory authority invoked and the context of the situation. *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 216, 228. In that case, as here, no detailed findings of fact were required by the applicable statute. The conclusions that the differentials were "just and reasonable" and "necessary and desirable in the public interest" were held to be adequately supported by the record when read as a whole. *Florida* v. *U. S.*, 282 U. S. 194, cited for appellee as emphasizing the necessity for findings, related to the Interstate Commerce Commission's power to prescribe rates—a situation absolutely different from that here involved.

The appropriate judicial approach toward administrative determinations is truly outlined in *Niagara Hudson Corp.* v. *Leventritt*, 340 U. S. 336 and *Radio Corporation of America, et al.*, v. *United States* (not yet officially reported) 19 Law Week 4337. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, cited by appellee, does not match the situation here presented. The *Niagara Hudson* and *Radio Corporation* cases emphasized the special capacities of administrative bodies for dealing with technical ques-

tions involving broad public considerations. In the *Universal Camera* case the question involved was as to the weight of substantiating evidence, and the case held that the findings of a Trial Examiner, who saw and heard the witnesses, were entitled to appropriate weight. There being no conflict in the evidence in the instant case as to the method of arriving at the differential, the application of the *Universal Camera* case is not apparent. Further, in that case the Supreme Court was careful to re-emphasize the sound principle of the finality of administrative determination in conclusions of the character here involved, saying (p. 488):

> "Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

The function of the reviewing court is also aptly defined in *U. S.* v. *Pierce Auto Lines*, 327 U. S. 515 (cited by appellee), where this Court said (page 536):

> "The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without

> authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

See also *National Labor Relations Board* v. *Denver*, 19 Law Week, 4359, 4364 (June 4, 1951).

Substitution of mental gymnastics, or of definitions isolated from sea-transport subject matter, for administrative expertise in the consideration of broad questions of shipping policy and related public interest would soon destroy the usefulness of the Federal Maritime Board in carrying out the policies set by Congress; and said Board's administrative process as a whole and its rather effective policing thereunder would be robbed of their vitality.

The motion to dismiss or affirm should be denied and the appeal upheld.

Respectfully submitted,

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27 William Street,
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June 21, 1951.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served on the parties hereto by mailing true copies thereof, postage prepaid, on this 21st day of June, 1951, to the following addresses:

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